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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 FELIX HERNANDEZ, et al.,

12 Plaintiffs,

13 vs.

14 STATE FARM FIRE & CASUALTY
15 COMPANY, et al.,

16 Defendants.
17

CASE NO. 16cv200-LAB (JLB)

**ORDER GRANTING MOTIONS TO
STRIKE, AND DENYING WITHOUT
PREJUDICE MOTIONS TO DISMISS**

**[DOCKET NUMBERS 38, 40, 42, 43,
47.]**

18 In their first amended complaint ("FAC"), Felix and Maria Emma Hernandez on their
19 own behalf and on behalf of a putative class bring fraud, unfair competition, and related
20 claims in connection with water mitigation claims under their insurance policy.

21 Plaintiffs own a condominium in Santa Ana, California that was damaged by water,
22 leaving it uninhabitable. They allege State Farm discouraged them from using any mitigation
23 company other than ServiceMaster or Servpro, and falsely claimed that those two companies
24 were independent. They allege they contacted ServiceMaster, whose local franchise failed
25 to carry out the mitigation services competently, which resulted in further losses. After they
26 complained about ServiceMaster's work, they say State Farm steered them to Servpro,
27 whose local franchise also did a bad job.

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1 Plaintiffs allege that by arrangement among Defendants, insureds receive significantly
 2 less in the way of mitigation services than they have been led to expect, and that as a result
 3 Defendants profit unfairly. They also make allegations of financial harm and damage to their
 4 home and class members' homes.

5 Plaintiffs are bringing claims against State Farm Fire and Casualty Company
 6 ("SFFCC"); State Farm General Insurance Company ("SFGIC"); The ServiceMaster
 7 Company, LLC ("ServiceMaster"); Servpro Industries, Inc. ("Servpro"); Douglas D. Dehart,
 8 Inc. dba ServiceMaster Absolute Water and Fire Damage Service ("ServiceMaster Local");
 9 and Servpro of Santa Ana South ("Servpro Local"). The FAC refers to SFFCC and SFGIC
 10 collectively as "State Farm". Plaintiffs are suing for breach of contract and intentional
 11 interference with contractual relations; claims against all Defendants for breach of the
 12 implied covenant of good faith and fair dealing; and claims under various California statutes
 13 against all Defendants for various unfair business practices. The FAC brought claims
 14 against several individual Defendants as well, but those were voluntarily dismissed.

15 Defendants' motions ask the Court to dismiss the FAC for failure to state a claim
 16 pursuant to Fed. R. Civ. P. 12(b)(6), to strike class claims pursuant to Fed. R. Civ. P. 12(f),
 17 and to dismiss fraud claims that are not pled to the standard required by Fed. R. Civ. P. 9(b).

18 **Jurisdiction**

19 Jurisdiction has been a question in this case from the start. When the Court issued
 20 an order requiring Plaintiffs to show cause regarding jurisdiction, it was not only the Plaintiffs
 21 who responded. Two Defendants also spontaneously filed briefs (Docket nos. 8 and 9)
 22 conceding that the Court had subject matter jurisdiction under the Class Action Fairness Act
 23 (CAFA). Of course, subject matter jurisdiction can never be waived, even by consent, and
 24 the Court is obligated to raise the issue *sua sponte* even if the parties concede it. *Arbaugh*
 25 *v. Y&H Corp.*, 546 U.S. 500, 514 (2006). The Supreme Court has made clear that
 26 presumption must be presumed to be lacking, until it is affirmatively shown. *Kokkonen v.*
 27 *Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Furthermore, the Court *must*
 28 confirm its jurisdiction before proceeding to the merits, even if the jurisdiction is complex and

1 the merits question is relatively straightforward. *Steel Co. v. Citizens for a Better Environ.*,
 2 523 U.S. 83, 94 (1998). If jurisdiction is lacking, the Court must announce that fact and
 3 dismiss. *Id.*

4 If the Court has jurisdiction at all, it must be under CAFA. Neither the original
 5 complaint nor the FAC raises a federal question, and no basis for a federal claim is
 6 apparent. Ordinary diversity jurisdiction is unavailable because the parties are not
 7 completely diverse. Plaintiffs are California citizens, as are at least two Defendant, Douglas
 8 D. DeHart, Inc. and Servpro Santa Ana South.¹ But other Defendants are non-California
 9 citizens. Because CAFA only requires minimal diversity — i.e., one plaintiff and one
 10 defendant who are citizens of different states — this requirement is satisfied. See 28 U.S.C.
 11 § 1332(d)(2)(C). Because facts to satisfy other requirements are properly alleged, the Court
 12 can exercise CAFA jurisdiction.

13 In their motions to dismiss, Defendants are asking the Court to strike class action
 14 allegations. Doing so would deprive the Court of jurisdiction to reach the merits. The Court
 15 will therefore address requests to strike before requests for dismissal.

16 The multiple sets of briefing have thoroughly covered most of the important issues.
 17 Of course, the Court must address any jurisdictional defects, even if not raised. This is
 18 particularly important here, where Defendants challenge the putative class members'
 19 standing. It is also relevant with regard to Plaintiffs' and the class's standing to seek
 20 injunctive relief.

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 24 ¹ The citizenship of The ServiceMaster Company, LLC is not completely alleged. The
 25 only allegations concern where it and its sole member — another LLC — have their principal
 26 places of business and under which states' laws they are organized. For an LLC, that does
 27 not establish citizenship for purposes of ordinary diversity jurisdiction. *Johnson v. Columbia*
 28 *Properties Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006). Under CAFA, however, an
 LLC is deemed to be a citizen both of the state where it has its principal place of business
 as well as the state under whose laws it is organized. § 1332(d)(10). But the FAC fails to
 allege this company's principal place of business. All it alleges are that the company is
 organized under Delaware law (making it a citizen of Delaware), and facts about the LLC that
 owns it. (FAC, ¶ 37.) For CAFA purposes, citizenship of an LLC's owner does not
 determine citizenship, however.

Legal Standards

Under Fed. R. Civ. P. 12(f), the Court can strike from a pleading any “redundant, immaterial, impertinent, or scandalous matter,” either *sua sponte* or in response to a motion. In general, the appropriateness of proceeding as a class action is not tested at the pleading stage, but there is no rule preventing this. As the Supreme Court has explained, most of the time determining whether a case can proceed as a class action involves deciding factual and legal questions that are closely tied up with the cause of action itself. *Gen'l Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982). In their opposition, Plaintiffs rely on the fact that a motion to strike *usually* is an inappropriate way to test class claims.

That being said, “[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff’s claim.” *Id.* See also *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (construing *Falcon* as holding that it may sometimes be necessary to look beyond the pleadings to determine whether class treatment was appropriate). When it is clear from the complaint that class actions cannot be maintained, the Court may grant a motion to strike them. *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 990–91 (N.D. Cal. 2009). This Court, too, has treated motions to strike as an appropriate means of testing class claims. *Kim v. Shellpoint Partners, LLC*, 2016 WL 1241541 (S.D. Cal. Mar. 30, 2016) (citing *Brown v. Hain Celestial Group, Inc.*, 913 F. Supp. 2d 881, 888 (N.D. Cal., 2012)).

The parties have cited both state and federal decisional law. Plaintiffs’ claims arise under state law, and state substantive law governs them. But procedural aspects of class actions in federal court are governed by Fed. R. Civ. P. 23, *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), and the Court first looks to federal law to resolve those issues. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). The briefing focuses on Rule 23(a)(2)’s commonality requirement, 23(b)(1)’s superiority requirement, and 23(b)(3)’s predominance requirement. The claims must depend upon a common contention of such a nature that it is capable of classwide resolution. *Wal-Mart*, 564 U.S. at 350.

1 At the pleading stage, the Court may consider not only the complaint itself, but also
2 documents it refers to, whose authenticity is not questioned, and matters judicially noticed.
3 *Zucco Partners LLC v. Digimarc Corp.*, 552 F.3d 981, 990 (9th Cir. 2009). Plaintiffs bear the
4 burden of pleading, and ultimately demonstrating, compliance with Rule 23's requirements.
5 *Zinser*, 253 F.3d at 1186.

6 Discussion

7 At the outset, it should be noted that recent Ninth Circuit authority probably rules out
8 the possibility of this being a Rule 23(b)(2) class, or of a prospective injunction providing
9 meaningful relief to the class. *Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071 (9th Cir. 2017),
10 a Fair Debt Collection Practices Act case, dealt with an injunction forbidding the defendant
11 from placing improper debt collection phone calls to class members in the future. The class
12 was defined as those who had received such calls in the past, not those likely to receive
13 them in the future. *Id.* at 1079. Even without an injunction, the chance of a class member
14 receiving a debt collection call from the defendant in the future was slim. *Id.* at 1079–80.
15 Similarly, the likelihood of class members in this case experiencing water damage in their
16 homes and suffering the same kind of injury again is slim. And the likelihood that most of
17 the class would have the same experience again, *see id.* at 1080, is infinitesimal. Assuming
18 this case goes forward as a class action, it almost certainly must go forward as a damages
19 class action.

20 The FAC defines the class to include “All State Farm policyholders in California who,
21 on or after January 1, 2005, made water loss claims, participated in State Farm’s PSP
22 Program[,] and had water mitigation services provided by a ServiceMaster and/or Servpro
23 franchisee.” (FAC, ¶ 76.)

24 Defendants individually raise various problems with maintaining this case as a class
25 action, and Plaintiffs’ opposition briefs respond. Because there is a good deal of overlap,
26 and joinder in one another’s motions, this order will address the gravamen of the arguments,
27 particularly those with jurisdictional aspects, rather than discussing each set of briefing
28 seriatim.

1 Defendants point out problems with pleading injury by class members. Namely, even
 2 if Defendants did everything the FAC alleges they did, class members may still not have
 3 suffered compensable injuries. According to the FAC, insureds are kept unaware of the
 4 relationship between State Farm and the other Defendants, and are not told about conflicts
 5 of interest or secret understandings among Defendants. The effect of these understandings
 6 is that State Farm controls the amount of repair work done, and caps the price. (FAC, ¶ 7.)
 7 But the FAC does not allege that State Farm's limits on the scope of mitigation and amount
 8 it would pay are or were so low that they were inadequate as to the entire class. This is
 9 particularly true of class members with relatively light, limited water damage; or damage that
 10 for some other reason was easier or less expensive to mitigate.

11 This leaves open the distinct possibility that many, perhaps most, class members
 12 were provided with satisfactory mitigation services. Insureds who were satisfied with the
 13 work done on their homes had no reason either to demand that the work be done to a higher
 14 standard, or to attempt to make a claim under the 5-year warranty afterwards. Furthermore,
 15 for those whose homes underwent mitigation more than five years before the suit was filed,
 16 the warranty has already expired, so those class members cannot pursue warranty remedies
 17 at this point even if they are dissatisfied with the quality of the work. Even if, as Plaintiffs
 18 allege, the warranties were illusory, they have not lost anything. Such class members were
 19 not injured, and lack standing to sue. This, by itself, would prevent the case from proceeding
 20 as a class action. See *Sanders*, 672 F. Supp. 2d at 991 (quoting *Denney v. Deutsche Bank*
 21 *AG*, 443 F.3d 253, 264 (2d Cir. 2006)) (“[N]o class may be certified that contains members
 22 lacking Article III standing . . . The class must therefore be defined in such a way that anyone
 23 within it would have standing.”)

24 Another problem is that ServiceMaster Local and Servpro Local are not the only
 25 franchises or subsidiaries of their respective parent companies in California.² (FAC, ¶ 37.)
 26 They do not service the entire state, and not all class members do business with either of

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 28 ² ServiceMaster represents in its briefing that there are “scores of independently
 owned and operated franchisees across California” (Docket no. 43-1, 2:25–3:1,
 20:12–15.)

1 them. (*Id.*, ¶¶ 42, 49.) The FAC does not name other local franchisees or subsidiaries who
2 provided service at the request of ServiceMaster or Servpro. And even if it did, it is unlikely
3 Plaintiffs could allege that all local franchisees uniformly applied company policy and
4 provided similarly defective service so as to cause comparable damage to all class
5 members.

6 For example, ServiceMaster Local and Servpro Local are alleged damaged Plaintiffs'
7 house and belongings (FAC, ¶ 72(l)), covered up mold contamination (*id.*, ¶ 72(l)), caused
8 widespread mold contamination (*id.*, ¶ 72(n)), and provided services negligently. (*Id.*,
9 ¶ 72(s).) The FAC doesn't allege that this arose from some uniform policy or practice, or that
10 class members suffered the same damage or even the same kind of damage. And it isn't
11 likely Plaintiffs can allege that every franchise or subsidiary in the state did the same to class
12 members. Even if some of the claims arose out of ServiceMaster's and Servpro's policies
13 that franchisees were required to follow, it isn't alleged how much arose as a result of
14 uniform statewide policy as opposed to the local franchisees' own deliberate and negligent
15 actions. (See *id.*, ¶ 53(c); ¶ 64–65, ¶ 68–72.) In this sense, Plaintiffs' claims differ from the
16 putative class's claims, and the nature of class members' claims varies from one member
17 to the next, which tends to undermine commonality.

18 The briefing appears to assume Plaintiffs can represent class members who are
19 bringing similar claims against different local franchisees not named as parties. But this
20 cannot be. Class members cannot recover against non-Defendants, and they cannot
21 recover from a Defendant they never did business with. And Plaintiffs can only represent
22 class members who are suing either ServiceMaster Local or Servpro Local, not those who
23 are seeking to recover from some franchisee Plaintiffs never did business with. See *Henry*
24 *v. Circus Circus Casinos, Inc.*, 223 F.R.D. 541, 543 (D. Nev. 2004) (“[A]t least one named
25 plaintiff must have standing in his own right to assert a claim against each named defendant
26 before he may purport to represent a class claim against that defendant.”). So, to the extent
27 class members have claims against other franchisees, their claims are not amenable to
28 resolution by class action. In order for a class action to go forward, Plaintiffs would have to

1 either name a multitude of new class representatives, or abandon those claims.
2 Alternatively, Plaintiffs would have to abandon all claims against any franchisee.
3 Abandonment of meritorious class claims for the sake of maintaining a class action
4 undercuts the rationale for allowing class actions in the first place, and bespeaks inadequate
5 representation. The Court therefore concludes that standing is a serious problem that likely
6 prevents this case from being litigated as a class action.

7 For a large number of class members — perhaps most — causation is also a
8 problem. Even if they were lied to and sold worthless warranties, class members who were
9 satisfied with the water mitigation services they were provided suffered no loss. Those who
10 suffered damages that were less than State Farm's alleged secret cap also presumably
11 received all they were all entitled to. And, as noted, others cannot sue ServiceMaster Local
12 or Servpro Local, because neither of these local franchisees provided them with water
13 mitigation services. Plaintiffs cannot serve as representatives for class members whose
14 water mitigation services were provided by some other local franchisee.

15 Defendants argue commonality is so lacking that this action cannot be maintained as
16 a class action. They also argue that a class action is not a superior method of adjudicating
17 these claims. To a great extent, their arguments focus on the extensive fact-finding that
18 would be necessary in order to determine whether each class member has a valid claim.

19 State Farm cites portions of insurance policies,³ pointing out that claims arising from
20 failure to provide insurance coverage involves subsidiary issues. The class definition weeds
21 out insureds whose claims were not covered or who did not make claims. But it does not
22 weed out those whose claims were properly denied or limited because they either failed to
23 protect their property from further damage by making reasonable and necessary temporary
24 repairs. (Docket no. 40-2, Ex. 5 (Policy) at 99.) It does not seem likely these

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27 ³ State Farm asks the Court to take judicial notice of Plaintiffs' policy (Docket no. 40-
28 2). At this stage, the Court need not formally notice the policy, because the FAC refers to it and relies on it, and because its authenticity is not questioned. *See Zucco*, 552 F.3d at 990. In fact, Plaintiffs' opposition to State Farm's motion cites State Farm's request for judicial notice. (Docket 58 at 1 n.1.)

1 class members are very numerous, but the possibility that some of class members fall into
2 this category adds some force to Defendants' argument.

3 Defendants also point out that, to succeed on a claim, class members must each
4 show that Defendants made misleading representations to them, that they relied on them,
5 and that the mitigation services they received were inadequate and less than they were
6 entitled to. With regard to the reliance problems, Plaintiffs have minimized some of these
7 problems, by alleging that State Farm uses a standardized script when insureds call, and use
8 standardized contracts and form letters. See *McPhail v. First Command Fin'l Planning, Inc.*,
9 247 F.R.D. 598, 614 (S.D. Cal. 2007) (citing authority for principle that plaintiffs can establish
10 a presumption of reliance by showing a defendant used a sufficiently uniform marketing
11 script). But causation remains a problem, as discussed above. Defendants correctly point
12 out that "both fraud and warranty claims are difficult to maintain on a nationwide basis"
13 *Sanders*, 672 F. Supp. 2d 991 (citing authority). While this does not show a class cannot
14 be certified, it does suggest that Plaintiffs' attempts to maintain this case as a class action
15 are not likely to succeed. Should they fail, this case will be dismissed for lack of jurisdiction.

16 Finally, as a practical matter, it is difficult to say why proceeding as a class action is
17 superior to individual actions. For those insureds who truly believe they were injured in ways
18 the FAC alleges, the value of a lawsuit is likely to be high. It is very likely they could and
19 would bring claims on their own behalf. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591,
20 617 (1997) (explaining that, while "cases in which individual damages run high" can still be
21 certified as class actions, the policy behind allowing class actions is intended primarily to
22 allow plaintiffs with relatively small recoveries to aggregate their losses); Compare *Wolin v.*
23 *Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1176 (9th Cir. 2010) (class action was a
24 superior method of litigation, because each class member's damages were small). In
25 addition, damages would have to be individually adjudicated, which undermines the rationale
26 for proceeding as a class action. See *Grundmeyer v. Allstate Property & Casualty Ins. Co.*,
27 2015 WL 9487928, at *3–4 (W.D. Wash., Sept. 29, 2015) (finding a class action not

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1 superior, because damage to members' homes was likely to be large and not uniform across
2 the class).

3 **Conclusion and Order**

4 If this case cannot proceed as a class action, the Court has no jurisdiction. Because
5 the class definition includes insureds who were not injured at all, or whose claims are not
6 remediable, or who were not injured by either of the two local franchises named as
7 Defendants, class allegations are defective. Furthermore, as to any claims against local
8 franchisees other than the two named as Defendants, the class has no adequate
9 representative. These problems alone would merit striking the class claims. But Defendants
10 have made other arguments that raise serious questions about Plaintiffs' ability to maintain
11 this case as a class action, even if Plaintiffs can get past the other obstacles.

12 In light of the Ninth Circuit's recent decision in *Koby*, 846 F.3d 1071, proceeding as
13 an injunctive class action under Rule 23(b)(2) is probably not an option.

14 The Court will therefore **GRANT** requests to strike class claims. With class claims
15 stricken, the Court lacks jurisdiction and the FAC must be dismissed. Because the Court
16 lacks jurisdiction, there is no reason at this time to decide the motions to dismiss for failure
17 to state a claim; it is not even clear whether the case will go forward in this Court. And in any
18 event, until jurisdiction is established, the Court cannot make a ruling on the merits.

19 The class claims are **ORDERED STRICKEN**, and the FAC is **DISMISSED WITHOUT**
20 **PREJUDICE** for lack of jurisdiction. If Plaintiffs believe they can successfully amend so that
21 class claims would survive a second round of motions to strike, they should seek leave to
22 file a second amended complaint. They may do so by filing an *ex parte* application,
23 attaching as an exhibit the proposed SAC, within **21 calendar days of the date this order**
24 **is issued**. The proposed amended SAC must remedy all the defects this order has
25 identified. If it seeks an injunction, it should plead facts to show why the Court would have
26 jurisdiction over such a claim, in light of *Koby*. And as to each claim, and the case as a
27 whole, it must show that the Court has subject matter jurisdiction. Defendants may file a joint

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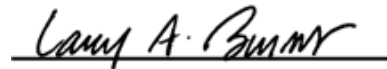
1 opposition within **10 calendar days** of the date the application is filed. Their opposition, if
2 they file one, should focus solely on whether the case can proceed as a class action.

3 The motions to dismiss are **DENIED WITHOUT PREJUDICE**. If the Court is inclined
4 to grant the application to file a second amended complaint, Defendants will be given an
5 opportunity to raise these issues again.

6 If Plaintiffs do not seek leave to amend within the time permitted, this action will be
7 dismissed without prejudice but without leave to amend, for lack of jurisdiction. If Plaintiffs
8 decide to pursue their claims in state court, they should file a notice of dismissal or joint
9 motion to dismiss.

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11 **IT IS SO ORDERED.**

12 DATED: March 9, 2017

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14 **HONORABLE LARRY ALAN BURNS**
15 United States District Judge
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